Innovative Communications Corporation and Virgin Islands Telephone Company (VitelCo) and St. Croix Cable T.V., Inc. *and* Our Virgin Islands Labor Union and United Steelworkers of America, AFL–CIO, CLC, Party to the Contract. Case 24–CA–8472

March 23, 2001

DECISION AND ORDER

BY CHAIRMAN TRUESDALE AND MEMBERS LIEBMAN AND WALSH

On September 29, 2000, Administrative Law Judge C. Richard Miserendino issued the attached decision. The Respondent filed exceptions and a supporting brief. The General Counsel filed an exception and a supporting brief. Both the Respondent and the General Counsel filed answering briefs.[1] The General Counsel filed a reply brief and a motion to strike Respondent's documents.[2]

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[3] and conclusions[4] and to adopt the recommended Order[5] as modified and set forth in full below.[6]

ORDER

The National Labor Relations Board orders that the Respondent, Innovative Communications Corporation and Virgin Islands Telephone Company (VitelCo) and St. Croix Cable T.V., Inc., St. Croix, U.S. Virgin Islands, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Giving unlawful assistance and support to the United Steelworkers of America, AFL–CIO, CLC.

[1] The Respondent also filed a supplement to its answering brief.

[2] The General Counsel has moved to strike documents attached to the Respondent's answering brief. The documents consist of the General Counsel's brief to the District Court in the 10(j) proceeding as well as a letter from the Charging Party's counsel to the Respondent that had allegedly been forwarded to the General Counsel. Because these documents have not been made a part of the record in the instant case, we grant the General Counsel's motion to strike. *Lockheed Martin Tactical Aircraft Systems*, 331 NLRB (2000); *Chicago Tribune Co*., 304 NLRB 259 fn. 1 (1991).

In its supplement to its answering brief, the Respondent has attached a copy of the transcript from the 10(j) proceeding before the District Court. The Respondent particularly focuses on arguments made by the General Counsel during that proceeding. We strike the attachment because the transcript has not been made a part of the record in the instant case and the Respondent has not filed a motion to reopen the record to include the 10(j) transcript. Further, even if the Respondent had made such a motion it would have been denied because the Respondent has made no showing that the transcript would "require a different result." Sec. 102.48(d)(1) of the Board's Rules and Regulations. See *Lockheed Martin Tactical Aircraft Systems*, supra, 331 NLRB .

[3] As set forth in the judge's decision, this case arises in the context of a valid election petition filed by the Charging Party in Case 24–RC–8060 to represent the St. Croix Cable employees. (In accordance with the parties' stipulation, the judge found that the petition was filed on August 27, 1999. The petition itself is dated August 11, 1999. We correct the inadvertent error.) The petition resulted in a Stipulated Election Agreement signed by the Respondent, the Charging Party, and the United Steelworkers of America, AFL–CIO, CLC (Steelworkers). The judge correctly found that the Respondent thereafter acted in violation of well-established Board law by continuing to negotiate with the Steelworkers concerning the merger/consolidation of the job functions at St. Croix Cable and other company subsidiaries, and by ultimately recognizing the Steelworkers as the exclusive bargaining representative of the St. Croix Cable employees. In adopting the judge's decision, we express no view on whether we would reach the same result in the absence of the filing of the election petition.

[4] The judge found, and we agree, that the St. Croix Cable bargaining unit employees are not an accretion to the VitelCo bargaining unit. As the judge stated, the "evidence shows that the VitelCo and St. Croix Cable employees were located in separate facilities, performing separate job functions, and that they would continue to perform those separate job functions in separate facilities for quite some time." Although the Respondent intends to consolidate VitelCo and St. Croix Cable employees at a single new location, there is nothing in the parties' stipulation of facts showing that such a consolidation has actually taken place. In these circumstances, we find it unnecessary to pass on the judge's dicta in sec. II,B,1, par. 5 of his decision that even if a merger of operations were to occur, a finding of accretion would not be appropriate.

[5] The judge recommended ordering the Steelworkers to, inter alia, cease and desist from acting as the collective-bargaining representative for the St. Croix Cable T.V., Inc. unit employees and to reimburse the St. Croix Cable employees for all dues withheld from them pursuant to the union-security provision in the collective-bargaining agreement between the Steelworkers and the Respondent. No unfair labor practice charge was filed against the Steelworkers and, while the General Counsel named the Steelworkers in the complaint as a "Party to the Contract," the Steelworkers neither appeared nor participated in the proceedings. While the Steelworkers of course has an interest in the sense that it is a party to the negotiations and the collective-bargaining agreement from which the violations in this case originated, it was neither alleged in the complaint nor litigated that the Steelworkers committed any unfair labor practice that would warrant the issuance of a remedial order directed against the Steelworkers. Therefore, we lack jurisdiction over the Steelworkers for the purpose of issuance of a remedial order against it. See *Teamsters Local 291 (Kaiser Industries),* 236 NLRB 1100, 1106 fn. 20 (1978), enfd. in part 633 F.2d 1295 (9th Cir. 1980). We shall modify the judge's recommended Order accordingly.

[6] The General Counsel excepted to the judge's failure to provide an adequate remedy for the 8(a)(5) unilateral change finding made at par. 6 of the conclusions of law section of the judge's decision. The General Counsel, citing *Children's Hospital,* 312 NLRB 920, 931 (1993), enfd. sub nom. *California Pacific Medical Center v. NLRB,* 87 F.3d 304 (9th Cir. 1996), asserts that in situations where some of the unilateral changes benefit the employees and others appear to be to their detriment, the Board should issue a "status quo ante restoration order conditioned upon the affirmative desires of the [employees] as expressed through their bargaining representative." We agree with the General Counsel and shall modify the recommended Order accordingly. We shall also correct other inadvertent errors and omissions.

(b) Recognizing and bargaining with the United Steelworkers of America, AFL–CIO, CLC as the exclusive representative of employees in the St. Croix Cable T.V., Inc. bargaining units.

(c) Entering into and giving force and effect to a collective-bargaining agreement with the United Steelworkers of America, AFL–CIO, CLC, covering the employees in the St. Croix Cable T.V., Inc. bargaining units.

(d) Encouraging membership in the United Steelworkers of America, AFL–CIO, CLC and discouraging membership in Our Virgin Islands Labor Union, or in any other labor organization, by discriminating with respect to the employees' hire, tenure, and terms and conditions of employment.

(e) Unilaterally changing the existing wages, benefits, and terms and conditions of employment of the employees in the St. Croix Cable T.V., Inc. bargaining units.

(f) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Withdraw and withhold recognition of the United Steelworkers of America, AFL–CIO, CLC as the exclusive representative of the employees in the St. Croix Cable T.V., Inc. bargaining units as described below:

UNIT A

INCLUDED: All customer service technicians, installers, construction employees, and multiple dwelling unit installers employed by the Respondent at its place of business in St. Croix, U.S. Virgin Islands.

EXCLUDED: All other employees, managerial employees, clerical employees, accounting employees, professional employees, confidential employees, any VitelCo contracted employees, guards and supervisors as defined in the Act.

UNIT B

INCLUDED: All maintenance employees, dispatchers, customer service representatives, lead customer service representatives, and cashiers employed by the Respondent at its place of business located in St. Croix, U.S. Virgin Islands.

EXCLUDED: All other employees, managerial employees, clerical employees, accounting employees, professional employees, confidential employees, and VitelCo contracted employees, guards and supervisors as defined in the Act.

(b) Reimburse all former and present employees in the St. Croix Cable T.V., Inc. bargaining units for all initiation fees, dues, and other moneys which may have been withheld from them pursuant to the union-security provision in the Respondent's collective-bargaining agreement with the United Steelworkers of America, AFL–CIO, CLC, with interest as provided in *New Horizons for the Retarded,* 283 NLRB 1173 (1987).

(c) If the employees in the St. Croix Cable T.V., Inc. bargaining units, through their representative, Our Virgin Islands Labor Union, so desire, revoke and cease giving effect to the changes in the aforementioned employees' terms and conditions of employment, which were implemented on or immediately after October 1, 1999; and in the event of such revocation, make employees whole for any losses they may have suffered as a result of said changes. Backpay shall be computed in accordance with *Ogle Protection Service,* 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), with interest as prescribed in *New Horizons for the Retarded,* supra.

(d) Recognize and, on request, bargain with Our Virgin Islands Labor Union as the exclusive bargaining representative of the employees in the St. Croix Cable T.V., Inc. bargaining units set forth above.

(e) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(f) Within 14 days after service by the Region, post at each of its facilities in St. Croix, U.S. Virgin Islands, copies of the attached notice marked "Appendix."[7] Copies of the notice, on forms provided by the Regional Director for Region 24, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since August 11, 1999.

[7] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

(g) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT give unlawful assistance and support to the United Steelworkers of America, AFL–CIO, CLC.

WE WILL NOT recognize and bargain with the United Steelworkers of America, AFL–CIO, CLC as the exclusive representative of the employees in the St. Croix Cable T.V., Inc. bargaining units.

WE WILL NOT enter into and give force and effect to a collective-bargaining agreement with the United Steelworkers of America, AFL–CIO, CLC, covering the employees in the St. Croix Cable T.V., Inc. bargaining units.

WE WILL NOT encourage membership in the United Steelworkers of America, AFL–CIO, CLC and discourage membership in Our Virgin Islands Labor Union, or in any other labor organization, by discriminating with respect to the employees' hire, tenure, and terms and conditions of employment.

WE WILL NOT unilaterally change the existing wages, benefits, and terms and conditions of employment of the employees in the St. Croix Cable T.V., Inc. bargaining units.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL withdraw and withhold recognition of the United Steelworkers of America, AFL–CIO, CLC as the exclusive representative of the employees in the St. Croix Cable T.V., Inc. bargaining units as described below:

UNIT A

INCLUDED: All customer service technicians, installers, construction employees, and multiple dwelling unit installers employed by us at our place of business in St. Croix, U.S. Virgin Islands.

EXCLUDED: All other employees, managerial employees, clerical employees, accounting employees, professional employees, confidential employees, any VitelCo contracted employees, guards and supervisors as defined in the Act.

UNIT B

INCLUDED: All maintenance employees, dispatchers, customer service representatives, lead customer service representatives, and cashiers employed by us at our place of business located in St. Croix, U.S. Virgin Islands.

EXCLUDED: All other employees, managerial employees, clerical employees, accounting employees, professional employees, confidential employees, and VitelCo contracted employees, guards and supervisors as defined in the Act.

WE WILL reimburse all former and present employees in the St. Croix Cable T.V., Inc. bargaining units for all initiation fees, dues, and other moneys which may have been withheld from them pursuant to the union-security provision in our collective-bargaining agreement with the United Steelworkers of America, AFL–CIO, CLC, with interest.

WE WILL, if the employees in the St. Croix Cable T.V., Inc. bargaining units, through their representative, Our Virgin Islands Labor Union, so desire, revoke and cease giving effect to the changes in the employees' terms and conditions of employment, which were implemented on or immediately after October 1, 1999; and in the event of such revocation, make employees whole, with interest, for any losses they may have suffered as a result of the changes.

WE WILL recognize and, on request, bargain with Our Virgin Islands Labor Union as the exclusive bargaining representative of the employees in the St. Croix T.V., Inc. bargaining units set forth above.

INNOVATIVE COMMUNICATIONS CORPORATION AND VIRGIN ISLANDS TELEPHONE COMPANY (VITELCO) AND ST. CROIX CABLE T.V., INC.

Lucy E. Reyes, Esq., for the General Counsel.
Jeffrey J. Fraser, Esq., of Grand Rapids, Michigan, for the Respondent.

DECISION

STATEMENT OF THE CASE

C. RICHARD MISERENDINO, Administrative Law Judge. Based on a charge filed in Case 24–CA–8472 by Our Virgin Islands Labor Union (OVILU or Union), on October 15, 1999, the Regional Director for Region 24 issued a complaint on April 24, 2000, against Innovative Communications Corporation (ICC), Virgin Islands Telephone Company (VitelCo), and St. Croix Cable T.V., Inc. (St. Croix Cable) (collectively called the Respondent) alleging that the Respondent violated Section 8(a)(1), (2), (3), and (5) of the Act by rendering unlawful assistance and support to the United Steelworkers of America, AFL–CIO, CLC (USW); discriminating in regard to the hire, tenure or terms and conditions of employment of the St. Croix Cable employees, and thereby discouraging their membership in the Union; making unilateral changes in the terms and conditions of employment of the St. Croix Cable employees; and failing and refusing to bargain collectively with the Union as the exclusive collective-bargaining representative of these employees within the meaning of Section 8(d) of the Act. The Respondent filed a timely answer admitting in part and denying in part the allegations of the complaint and raising affirmative defenses.

On June 7, 2000, the Respondent, the OVILU, the USW, and the General Counsel filed a stipulation of facts with the division of judges agreeing that the charge, the complaint, the answer to the complaint, and the stipulation, including attached exhibits, shall constitute the entire record in this proceeding and that no other testimony is necessary or desired. The parties further waived a hearing before an administrative law judge. By order, dated June 13, 2000, I approved the stipulation and the waiver and agreement as to content of record. All parties were granted leave to file briefs.

On the entire stipulated record, including the attached exhibits, and after considering the briefs filed by the General Counsel and the Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

The stipulated evidence shows that St. Croix Cable, a corporation with a facility in St. Croix, U.S. Virgin Islands, is engaged in the distribution of television signals by cable television to its customers in St. Croix, U.S. Virgin Islands. During the 12-month period preceding the filing of the complaint, St. Croix Cable derived gross revenues in excess of $100,000 from the distribution of television signals by cable television to its customers in St. Croix, U.S. Virgin Islands and purchased and received at its St. Croix, U.S. Virgin Islands facility goods valued in excess of $50,000 directly from points outside the U.S. Virgin Islands. (FS, pars. 3 and 4.)

The stipulated evidence also shows, and I find, that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. (FS, par. 5.)

The stipulated evidence shows, and I find, that the OVILU and the USW are labor organizations within the meaning of Section 2(5) of the Act. (FS, pars. 6 and 7.)

II. ALLEGED UNFAIR LABOR PRACTICES

A. Stipulated Facts

1. Background

VitelCo, VitalCom, Vitel Cellular, St. Croix Cable, and St. Thomas/St. John Cable TV are all ICC subsidiaries.[1] Since 1972, VitelCo employees have been represented by the USW under successive collective-bargaining agreements. Prior to October 1, 1999, the most recent successive collective-bargaining agreement covered the period October 1, 1996, to September 30, 1999. All other ICC subsidiaries are nonunionized companies, except St. Croix Cable, where the OVILU won an uncontested Board-conducted election on September 22, 1999.

2. VitelCo and the USW negotiate the merger/consolidation of job functions

In 1998, VitelCo made a business decision to merge/consolidate "job functions" at VitelCom, Vitel Cellular, St. Croix Cable and St. Thomas/St. John Cable TV into VitelCo in order to become more efficient and to be more competitive within the communications industry.[2] The merger/consolidation of job functions would result in the cross-training of all employees to perform telephone, cable, cellular, and all other communication functions so that one vehicle could be sent on one trip to a residence or commercial business to perform all communication functions. Customer service representatives (CSRs), cashiers, and all other positions, would be cross-trained to answer questions about telephone, cable, cellular and all other communication issues, instead of having separate CSRs, cashiers, etc., to answer questions for each communication function.

In early 1998, which was the mid-term of the 1996–1999 collective-bargaining agreement, VitelCo and the USW began negotiating the merger/consolidation of job functions at VitelCom, Vitel Cellular, St. Croix Cable and St. Thomas/St. John Cable TV into VitelCo. At the time, each ICC subsidiary had the following number of employees: VitelCo (257); VitelCom (7); Vitel Cellular (9); St. Croix Cable (24); and St. Thomas/St. John Cable TV (15). The merger/consolidation negotiations continued through 1998 and into 1999, up until September 1999. By September 22, 1999, VitelCo and the USW had resolved all issues relating to the merger/consolidation of job functions at VitelCom, Vitel Cellular, St. Croix Cable, and St. Thomas/St. John Cable TV and agreed that these job functions would be merged/consolidated into VitelCo.

[1] In its Br. at p. 2, the Respondent asserts that "VitelCo is one of several ICC subsidiaries" citing Fact Stipulation (FS), par. 12. It appears, however, that VitelCo was inadvertently omitted from FS, par. 12. Notwithstanding the oversight, the evidence viewed as a whole, supports a reasonable inference that VitelCo is a subsidiary of ICC.

[2] There was not a corporate merger of VitelCo, VitelCom, Vitel Cellular, St. Croix Cable, and St. Thomas/St. John Cable TV.

3. The OVILU becomes the exclusive bargaining representative of the St. Croix Cable employees

In the meantime, on August 27, 1999, the OVILU filed a petition for election with the Board in Case 24–RC–8060 to represent the St. Croix Cable employees. On August 30, 1999, the USW asked to be placed on the ballot as an intervenor in the election. On September 1, 1999, Andrea Martin, general manager for St. Croix Cable, and Terrence Nelson, president of OVILU, entered into a Stipulated Election Agreement, allowing the USW to appear on the ballot, and establishing the following units of St. Croix Cable employees as units appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act:

> UNIT A
>
> INCLUDED: All customer service technicians, installers, construction employees, and multiple dwelling unit installers employed by the Employer at its place of business located in St. Croix, U.S. Virgin Islands.
>
> EXCLUDED: All other employees, managerial employees, clerical employees, accounting employees, professional employees, confidential employees, any VitelCo contracted employees, guards and supervisors as defined in the Act.
>
> UNIT B
>
> INCLUDED: All maintenance employees, dispatchers, customer service representatives, lead customer service representatives, and cashiers employed by the Employer at its place of business located in St. Croix, U.S. Virgin Islands.
>
> EXCLUDED: All other employees, managerial employees, clerical employees, accounting employees, professional employees, confidential employees, and VitelCo contracted employees, guards and supervisors as defined in the Act.

On September 2, 1999, Frederick Joseph, subdistrict director for USW, signed the Stipulated Election Agreement.

Aso, on September 2, VitelCo and the USW commenced negotiations for a successor contract to the collective-bargaining agreement that was due to expire at the end of September.[3]

On Wednesday, September 22, 1999, a stipulated election was held. The St. Croix Cable employees unanimously elected the OVILU to be their exclusive bargaining representative.[4] Specifically, the OVILU received all 24 votes in the election. The USW received none. There were no ballots challenged and no objections to the election were filed.

On October 5, 1999, the OVILU was certified as the exclusive collective-bargaining representative of the St. Croix Cable bargaining units employees.

4. VitelCo and USW consummate a collective-bargaining agreement

In the meantime, on September 30, 1999, VitelCo and the USW reached a tentative 3-year collective-bargaining agreement covering the period October 1, 1999, to September 30, 2002. Two letters of understanding were added to the tentative contract thereby incorporating the terms of the previously negotiated merger/consolidation agreement. The following morning, October 1, the VitelCo bargaining unit employees ratified the new contract.

5. VitelCo recognizes the USW as the exclusive bargaining representative of the St. Croix Cable employees

On October 1, after the ratification vote, VitelCo signed the contract, recognized the USW as the exclusive bargaining representative of the St. Croix Cable bargaining units employees, and applied the new collective-bargaining agreement to them. In accordance with the VitelCo/USW contract, the St. Croix Cable bargaining units employees received wage and benefit increases, but lost a Christmas bonus, an employer contribution to a 401(k) plan, and about a $57-monthly subsidy in cable television service. They also were placed under a different health plan. The new contract credited the St. Croix Cable bargaining units employees with 1-year of seniority for every 3 years of company service at St. Croix Cable, but provided that if a layoff occurred within a job classification, VitelCo would lay off the St. Croix Cable bargaining units employees within that job classification before laying off the VitelCo employees.

Consistent with their self-imposed confidentiality requirement, none of the VitelCo/USW bargaining representatives advised the OVILU of terms of the merger/consolidation agreement or the tentative collective-bargaining agreement. On October 1, after the contract was ratified and implemented, VitelCo, through its attorney, Jeffrey J. Fraser, advised Lisa Moorhead, OVILU's attorney, for the first time of the existence and terms of merger/consolidation agreement.

On the same date, Beverly Chongasing, iCC human resource representative, met with St. Croix Cable bargaining units employees to explain the merger/consolidation issues and advise them that they were going to be moved into VitelCo.

On October 8, VitelCo Attorney Jeffrey J. Fraser held a telephone conference with Terrence Nelson, OVILU president, and Lisa Moorhead, OVILU legal counsel at that time, during which he offered to bargain the "effects" of the merger/ consolidation of job functions with OVILU.

6. VitelCo withholds dues on behalf of the USW

On October 16, 1999, the OVILU, VitelCo, and all the St. Croix Cable employees met at St. Croix Cable to discuss the VitelCo/USW collective-bargaining agreement and the merger/consolidation issues. At this meeting, the St. Croix Cable bargaining units employees stated that USW dues were being taken out of their paychecks. VitelCo told the employees that this had been a mistake because the employees had not signed dues-checkoff forms for the USW. The employees were

[3] As one of the ground rules for bargaining, the parties agreed "All negotiations should be kept confidential. If either party believes that a public statement or statements to non-company executives or non-bargaining committee union members should be made, they must provide 24 hours' written notice to the other side." (FS, par. 24.)

[4] As noted above, on the same day of the stipulated election, September 22, VitelCo and the USW agreed on all issues related to the merger/consolidation of the job functions at St. Croix Cable and the other subsidiaries. The agreement was reached at 8 a.m. The balloting began at 9 a.m. (Jt. Exh. 6.)

informed that any dues withheld from their paychecks would be held in escrow until further notice.

A short time later, Janice Thomas, an administrative assistant for St. Croix Cable, handed out USW dues-checkoff forms for the USW to the St. Croix Cable bargaining units employees.

On November 3, 1999, OVILU submitted dues-checkoff forms to the Respondent from the St. Croix Cable bargaining units employees. No dues were ever forwarded by the Respondent to OVILU.

In mid-November 1999, VitelCo Human Resources Representative Chongasing told the St. Croix Cable bargaining units employees that the VitelCo/USW collective-bargaining agreement required a closed shop and that they must sign dues-checkoff forms with the USW. (FS, par. 40.) Because the St. Croix Cable bargaining units employees believed that they would lose their jobs if they did not sign the dues-checkoff forms, they signed the USW dues-checkoff forms.

B. Analysis and Findings

1. The 8(a)(1), (2), and (3) violations

The General Counsel argues that the Respondent violated the Act by recognizing and bargaining with the USW as the exclusive representative of the St. Croix Cable bargaining unit employees, by extending the VitelCo/USW collective-bargaining agreement to them, and by unilaterally changing their terms and conditions of employment. The Respondent argues that it was proper to recognize the USW because the St. Croix Cable bargaining units employees are an accretion to the VitelCo bargaining unit.

The Board has defined an accretion as the addition of a relatively small group of employees to an existing unit where the additional employees have no separate identity and share a sufficient community of interest with the unit employees. *Ryder Integrated Logistics,* 329 NLRB 1493 (1999). In determining whether the additional employees share sufficient common interests with the members of the existing bargaining unit, the Board weighs various factors including "integration of operations, centralization of management and administrative control, geographic proximity, similarity of working conditions, skills and functions, common control of labor relations, collective-bargaining history, and interchange of employees. Id. at 1495. The Board has stated, however, that the issue of whether a group of employees constitutes an accretion to an existing bargaining unit must be determined on the facts that exist on the date the union's demand. *GHR Energy Corp.,* 294 NLRB 1011, 1052 fn. 37 (1989).

The operative date in this case for determining whether an appropriate accretion existed is August 30, 1999, the date on which the USW officially made a demand to recognize the St. Croix Cable employees by asking to be placed on the ballot as an intervenor in the election.[5] The evidence shows that as of August 30 the St. Croix Cable employees were not an accretion to the VitelCo bargaining unit. Rather, they had a separate identity in the form of a stipulated bargaining unit agreed to by the Respondent, the OVILU and, 2 days later, the USW. In addition, the evidence shows that the St. Croix Cable bargaining unit employees had not been moved to the same facility as the VitelCo employees and, more importantly, would continue working from a separate facility until at least August 2000. (FS, par. 34.)[6] H*udson Berlind Corp*., 203 NLRB 421, 422 (1973).

Nor does the evidence show that the St. Croix Cable bargaining unit employees shared a community of interest with the VitelCo bargaining unit employees. There is no evidence that the operations of VitelCo and St. Croix Cable were integrated. The former provided telephone service while the latter provided cable TV service. The evidence shows that the VitelCo and St. Croix Cable employees were located in separate facilities, performing different job functions, and that they would continue to perform those separate job functions in separate facilities for quite some time.[7] The evidence further shows that training was required in order to accomplish the merger of job functions, but that such training would not begin until after October 1, 1999. (Jt. Exh. 3, p. 85, par. H.) Regarding the centralization of management and administrative control, the evidence shows that there was no corporate merger of VitelCo and St. Croix Cable and that St. Croix Cable had its own general manager. (FS, par. 20.) In addition, there is no evidence of common control of labor relations. Although the evidence shows that on October 1, ICC Human Resources Representative Chongasing met with the St. Croix Cable employees to discuss their move into VitelCo, there is no evidence that she, or anyone else, from ICC was previously responsible for administering the labor relations duties for St. Croix Cable employees and/or the VitelCo employees. With respect to collective bargaining history, the evidence shows that the VitelCo bargaining unit employees have been represented by the USW since 1972, while the St. Croix Cable bargaining units employees were unrepresented up until September 22, 1999, when they unanimously elected the OVILU as their exclusive bargaining representative in an uncontested election.

When viewed as whole, the evidence shows that the Respondent's accretion argument is based, not on facts that existed on August 30, 1999, or any time soon afterwards, but on a prospective view of how it anticipates things will be after the training is completed, after the job functions are merged, and after St. Croix Cable bargaining units employees are moved to a new facility (if they are to be moved to a new facility). Even if the Respondent's vision of things to come were to become reality, a finding of accretion would not be appropriate because an accretion assumes that the functions and classifications of the transferred employees will remain essentially unchanged. *Massachusetts Electric Co.,* 248 NLRB 155, 157 (1980). Here, the evidence shows that the merger/consolidation of job functions

[5] At the very latest, the accretion date would be September 22, 1999, when the VitelCo and the USW reached an agreement on all the merger/consolidation issues thereby memorializing the USW's claim to represent the St. Croix Cable bargaining unit employees.

[6] The evidence also shows that as of the date of the submission of the Fact Stipulation, June 6, 2000, St. Croix Cable, ICC, and VitelCo were all operating from separate facilities.

[7] The expectation was to move the ICC subsidiaries into a new building in August 2000, but as of June 7, 2000, the date of the filing of Fact Stipulation, the St. Croix Cable bargaining units employees and all other subsidiary employees were still operating out of separate locations. (FS, par. 34.)

will create a new job in order to allow the employees of all the ICC subsidiaries "to perform telephone, cable, cellular, and all other communication functions." (FS, par. 16.) This would effectively change the functions and duties of the St. Croix Cable bargaining units employees. Moreover, the evidence shows that the merger will not result in moving the St. Croix Cable employees into an existing facility of VitelCo, but into a new facility with VitelCo, Vitelcom, Vitel Cellular.[8] Thus, the circumstances of this case are similar to the circumstances in *Hudson Berlind Corp.,* supra, 203 NLRB at 422, where the Board found that the combined and merged operations of two warehouses in an entirely new facility constituted a new operation, rather than an accretion to an existing operation.

Thus, I find that the St. Croix Cable bargaining units employees are not an accretion to the VitelCo bargaining unit.

The Respondent nevertheless argues that the USW was an incumbent union and therefore it was obligated to bargain with the USW regarding the merger/consolidation, even though the OVILU had filed a valid petition. The argument is unconvincing. The USW was not the incumbent union for the St. Croix Cable employees, who were unrepresented at the time the OVILU petition was filed. Thus, the Respondent's reliance on *RCA del Caribe, Inc.,* 262 NLRB 963 (1982), is misplaced. In that case, the Board redefined the obligations of an employer to continue bargaining when an incumbent union is challenged by an outside union. Rather, the applicable case here is *Bruckner Nursing Home,* 262 NLRB 955 (1982), a companion case of *RCA del Caribe,* which focused on an employer's requirement of strict neutrality in an initial organizing situation involving two or more rival unions, similar to the circumstances in this case.

In *Bruckner Nursing Home,* the Board stated that in rival union, initial organizing situations, like the one here, an employer must refrain from recognizing any rival unions, once notified of a valid petition. 262 NLRB at 957. The filing of a valid petition in an initial organizing situation imposes a requirement of strict employer neutrality leaving the rival unions to engage in an active contest to be resolved through a Board election, rather than through employer recognition.

A valid petition was filed on August 27, which resulted in a stipulated election agreement signed by the Respondent, the OVILU and the USW. The Respondent therefore had a duty of strict neutrality from that point forward and was obligated to discontinue negotiations with the USW regarding merger/ consolidation of the St. Croix Cable employee job functions.[9] Instead, it continued to negotiate with the USW, as if the petition never existed, and eventually reached a merger/ consolidation agreement with the USW on the date of the election, September 22, 1999.

By the end of the day, September 22, there could be no doubt that OVILU was the undisputed choice of the St. Croix Cable employees in both units, having defeated the USW by a vote of 24–0 in an uncontested election. VitelCo and the USW nevertheless went forward with collective-bargaining negotiations and, 1 week later, on September 30, consummated a successor collective-bargaining agreement that incorporated the previously agreed upon merger/consolidation agreement, thereby including the now represented St. Croix Cable employees in the VitelCo bargaining unit.[10] On October 1, the Respondent recognized the USW as the exclusive bargaining representative of the St. Croix Cable bargaining units employees and announced to those employees that they would be made part of the VitelCo bargaining unit. (FS, par. 32.)

Thus, I find that by recognizing the USW as the exclusive bargaining representative of the St. Croix Cable bargaining units employees, and by entering into and extending the collective-bargaining agreement to them, the Respondent ignored the representational desires of the St. Croix Cable bargaining units employees, ignored well established Board law, breached its duty of strict neutrality, and rendered unlawful assistance and support to the USW. Accordingly, I find that the Respondent's conduct violated Section 8(a)(1) and (2) of the Act.

The stipulated evidence also shows that shortly after October 1, 1999, the Respondent withheld dues for the USW from the paychecks of the St. Croix Cable bargaining units employees, even though they had not signed dues-checkoff forms. (FS, pars. 37 and 38.) In late October, the Respondent distributed USW dues checkoff forms to the St. Croix Cable employees. In mid-November, the Respondent told them that the VitelCo/ USW collective-bargaining agreement required a closed shop and required that they sign the dues checkoff forms with the USW. (FS, pars. 39 and 40.) I find that by its conduct the Respondent unlawfully assisted and supported the USW in violation of Section 8(a)(1) and (2) of the Act and also discriminated with respect to the hire, tenure, and terms and conditions of employment of the St. Croix Cable bargaining units employees, thereby discouraging membership in the OVILU and encouraging membership in the USW in violation of Section 8(a)(3) of the Act.

2. The 8(a)(5) violations

The stipulated evidence shows that on October 1, 1999, the Respondent unilaterally changed the wages, benefits and terms and conditions of employment of the St. Croix Cable bargaining units employees (FS, pars. 26–30) without prior notification or consultation with the OVILU.[11] It also shows that on November 3, the OVILU submitted to the Respondent dues checkoff forms from the St. Croix Cable bargaining units employees, but the Respondent acknowledged the Union's representative status by withholding or forwarding any dues to the

[8] Given the geographic distance between the islands of St. Croix, St. Thomas, and St. John, the evidence supports a reasonable inference that the St. Thomas and St. John employees would not be working out of a new facility on St. Croix.

[9] The Respondent, of course, was free to continue negotiations with the USW concerning the other subsidiaries' employees.

[10] In light of the evidence showing that no objections to the election were filed and no ballots were challenged it was a foregone conclusion that the OVILU would be certified as the exclusive bargaining representative of the St. Croix Cable bargaining units employees, which it was on October 5, 1999.

[11] After doing so, the Respondent offered to bargain with the OVILU on October 8 about the "effects" of the merger/consolidation. I find that the offer is too little and too late to cure a violation of Sec. 8(a)(5).

OVILU.[12] Accordingly, I find that the Respondent failed and refused to recognize and bargain with the OVILU as the exclusive bargainging representative of the St. Croix Cable bargaining units employees in violation of Section 8(a)(5) of the Act.

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The OVILU and USW are both labor organizations within the meaning of Section 2(5) of the Act.

3. The Respondent violated Section 8(a)(1) and (2) of the Act by recognizing the USW as the exclusive bargaining representative of the St. Croix Cable bargaining units employees after a valid election petition had been filed and after the OVILU had won an uncontested election; by entering into and extending the VitelCo/USW collective-bargaining agreement to the St. Croix Cable bargaining units employees; by withholding dues on behalf of the USW from the paychecks of the St. Croix Cable bargaining units employees without having obtained their signed authorization or consent; by urging the St. Croix Cable bargaining units employees to sign checkoff authorizations for the USW; by telling them that they were required to sign USW dues-checkoff forms; and by remitting dues to the USW, thereby unlawfully assisting and supporting the USW.

4. The Respondent violated Section 8(a)(1) and (3) of the Act by exacting dues for the USW from the paychecks of the St. Croix Cable bargaining units employees without having obtained their signed authorization or consent; by telling them that they were required to sign USW dues-checkoff forms; and by remitting dues to the USW, thereby discouraging membership in the OVILU and encouraging membership in the USW.

5. The Respondent violated Section 8(a)(1) and (5) of the Act by failing and refusing to recognize and bargain with the OVILU as the exclusive bargaining representative of the St. Croix Cable employees in the following units:

UNIT A

INCLUDED: All customer service technicians, installers, construction employees, and multiple dwelling unit installers employed by the Employer at its place of business located in St. Croix, U.S. Virgin Islands.

EXCLUDED: All other employees, managerial employees, clerical employees, accounting employees, professional employees, confidential employees, any VitelCo contracted employees, guards and supervisors as defined in the Act.

UNIT B

INCLUDED: All maintenance employees, dispatchers, customer service representatives, lead customer service representatives, and cashiers employed by the Employer at its place of business located in St. Croix, U.S. Virgin Islands.

EXCLUDED: All other employees, managerial employees, clerical employees, accounting employees, professional employees, confidential employees, and VitelCo contracted employees, guards and supervisors as defined in the Act.

6. The Respondent violated Section 8(a)(1) and (5) of the Act by unilaterally changing the existing wages, benefits, and terms and conditions of employment of the St. Croix Cable bargaining units employees.

7. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

Having found that the Respondent unlawfully recognized and bargained with the USW as the representative for the employees in the St. Croix Cable bargaining units and extended the VitelCo/USW collective-bargaining agreement to them, I shall recommend that the Respondent withdraw and withhold recognition of the USW as the representative for the employees in the St. Croix Cable bargaining units; cease and desist from giving effect to the VitelCo/USW collective-bargaining agreement signed on October 1, 1999, covering those employees; and return to the status quo ante: provided, however, that nothing herein shall authorize or require the Respondent to withdraw or rescind any wage increase or other enhanced benefit or enhanced term or condition of employment that may have been established pursuant to the performance of the above contract.

Having found that the Respondent unlawfully applied a union-security clause under the VitelCo/USW collective bargaining, I shall recommend that the Respondent jointly and severally with the USW reimburse all former and present St. Croix Cable bargaining units employees for all initiation fees, dues, and other moneys which may been withheld from them, with interest as provided in *New Horizons for the Retarded,* 283 NLRB 1173 (1987).

Having found that the Respondent unlawfully failed and refused to recognize and bargain with the OVILU as the exclusive bargaining representative of the St. Croix Cable bargaining units employees, I shall recommend that the Respondent shall recognize, and on request, bargain with the OVILU as the exclusive bargaining representative of those employees for the period required by *Mar-Jac Poultry Co.,* 136 NLRB 785, 787 (1962).

[Recommended Order omitted from publication.]

[12] Although there is no evidence that the OVILU formally demanded to bargain with the Respondent, I find that the evidence viewed as a whole supports a reasonable inference that such a demand would have been futile.